No. 92-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CENTRAL BANK OF DENVER, N.A.,
Petitioner,

v.

FIRST INTERSTATE BANK OF DENVER, N.A.,
AND JACK K. NABER,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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39 pp

QUESTIONS PRESENTED

Amicus curiae will address the following questions:

1. Whether there is an implied private right of action for aiding and abetting violations of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5.

2. Whether recklessness is an appropriate standard upon which to predicate liability for aiding and abetting violations of § 10(b) and Rule 10b-5.

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BRIEF *AMICUS CURIAE* OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

The Securities Industry Association ("SIA") files this brief *amicus curiae* in support of petitioner. The purpose of this brief is twofold: First, to demonstrate that the Congress that enacted § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b), did not create and would not have intended to create a private right of action for "aiding and abetting" violations of that statute; and second, to explain why, even if there were an implied § 10(b) private right of action for aiding and abetting, "recklessness" would be an improper standard upon which

to predicate liability because it would contradict the express language of § 10(b), conflict with the historical concept of aiding and abetting as a willful act, and inject intolerable confusion and uncertainty into the enforcement of the federal securities laws, thereby undermining the legislative goal of maintaining stable and efficient securities markets.

INTEREST OF *AMICUS CURIAE*

The Securities Industry Association is the principal trade association of the securities industry. Its members include approximately 700 securities firms in the United States and Canada. Its membership is responsible for over ninety percent of the securities business conducted in this country. SIA's members serve securities investors of every size and type and perform the complete spectrum of professional securities activities, including retail and institutional brokerage, over-the-counter market-making, underwriting and other investment banking activities, money management, and investment advisory services.

SIA is recognized as a spokesman for the securities industry in general and the broker-dealer community in particular. A major function of SIA is to address legislative and regulatory matters affecting the securities industry on the national and state levels.

SIA has a substantial interest in this Court's determination of the § 10(b) aiding and abetting issues presented by this case. Securities professionals are joined routinely in private § 10(b) actions solely on the basis of generalized allegations of "recklessly" aiding and abetting the violations of others and in the absence of any fiduciary or other duty owed to plaintiffs. For example, such claims are sometimes asserted against broker-dealers who as intermediaries perform vital but largely ministerial and remote functions in connection with securities transactions, such as clearing transactions between third parties, executing

non-discretionary orders received from third parties or serving as the custodian of funds of others. Accordingly, SIA is particularly well-suited to assist the Court in addressing the important issues presented by this case.[1]

STATUTE AND RULE INVOLVED

1. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b):

> **§ 78j. Manipulative and deceptive devices**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange —
>
> • • •
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

2. Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5:

> **§ 240.10b-5. Employment of manipulative and deceptive devices**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange,

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[1] Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

SUMMARY OF ARGUMENT

There is no basis for recognizing an implied private remedy for aiding and abetting violations of § 10(b). Although this Court in 1971 acquiesced in the lower courts' recognition of an implied private right of action for primary violations of § 10(b), and has since recognized limited judicial authority to "flesh out" the contours of that right, that does not provide authority to create a new private right of action for § 10(b) aiding and abetting. Such a remedy would be a separate and independent cause of action that establishes liability for a new class of defendants not already subject to suit. It necessarily would have elements that are different from the implied private remedy for primary § 10(b) violations. Thus, to impose § 10(b) aiding and abetting liability, the Court must do more than simply elaborate on the contours of the already existent § 10(b) implied private remedy: it must create an entirely new cause of action. But the Court has recently made clear that it will not recognize any new implied private right of action in the absence of clear evidence that Congress intended to create such a remedy. And there is nothing in the text or history of § 10(b) even remotely suggesting that Congress intended to create a private cause of action for § 10(b) aiding and abetting. Indeed, it was

not even Congress' design to create a private remedy for *primary* violations of § 10(b).

The express private remedial provisions of the 1934 Act and the Securities Act of 1933 ("1933 Act")—enacted contemporaneously with § 10(b)—do not impose aiding and abetting liability. Efforts to amend the express private rights of action to include aiding and abetting as a basis for a private damages action have been uniformly rejected. Instead, Congress has established and maintained a limited express remedial scheme to impose liability on certain collateral participants in securities transactions. Judicial creation of a new implied § 10(b) private remedy for aiding and abetting would directly undermine the policy choices of Congress regarding the type of secondary liability appropriate under the Nation's securities laws. This Court should not raise up yet another implied right of action under § 10(b) that has no basis in and would frustrate congressional intent.

Even if an implied private right of action for § 10(b) aiding and abetting could be discerned from congressional intent, it would be impermissible to permit recovery under that cause of action for recklessness. The operative language of § 10(b)—"manipulative or deceptive device or contrivance"—strongly suggests that § 10(b) prohibits only misconduct that is committed with actual knowledge of the fraud, not simply reckless behavior. Further, the recklessness standard is inconsistent with the criminal law concept of aiding and abetting, which inherently involves willful conduct and is the asserted doctrinal basis for imposing aiding and abetting liability under § 10(b). And the recklessness standard, in practice, has proven to be highly malleable and uncertain, often confused with the negligence standard that this Court has rejected as a basis for § 10(b) liability.

A recklessness standard is particularly inappropriate where, as in this case, the defendant had no fiduciary duty

of disclosure to the plaintiff and made no affirmative misrepresentations. Application of a recklessness standard would directly contradict this Court's decisions holding that § 10(b) liability, even against primary violators, may not be imposed based upon a defendant's silence in the absence of a duty of disclosure. Recklessness as a standard would subject securities professionals to costly and consuming § 10(b) litigation based not upon their actual awareness of the alleged fraud, or even upon their breach of a fiduciary duty, but rather simply upon their routine involvement in securities transactions. Such a result is highly unfair and runs directly counter to the goal of the Congress that enacted § 10(b) to devise a remedial scheme that would protect investors while minimizing unnecessary and intrusive interference with the operation of the Nation's securities markets.

ARGUMENT

A. The Congress That Enacted § 10(b) Did Not Create And Would Not Have Intended To Create A Private Right Of Action For Aiding And Abetting Violations Of § 10(b).

Neither the text of § 10(b) itself, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), nor the "contemporaneously enacted express remedial provisions," *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991), provide any evidence that the 73rd Congress—the Congress that enacted § 10(b)—intended to afford a right to private plaintiffs to sue participants in securities transactions for aiding and abetting a § 10(b) violation. Accordingly, there is no such private right of action. *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979).

1. Aiding And Abetting Is An Independent Cause Of Action.

Although this Court has recognized "judicial authority to shape, within limits," the implied private right of action for primary violations of § 10(b) that it has already accepted, *see Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 113 S. Ct. 2085, 2089 (1993), that authority provides no basis for creating a private right of action for "aiding and abetting" a violation of § 10(b). That is because a § 10(b) aiding and abetting claim is "a separate or independent cause of action." *Id.* at 2088. Indeed, if it were not, there would have been no reason for the lower federal courts to have invented it. The first case to recognize a § 10(b) implied private right of action for aiding and abetting was brought against the alleged aider and abettor only, without even joining the primary violator as a defendant, who was unavailable and judgment-proof.[2] Ever since that decision in 1966, the courts have treated aiding and abetting private claims asserted pursuant to § 10(b) as a stand-alone species of securities fraud, complete with its own elaborate and complicated jurisprudence.

The implied private right of action for a primary violation of § 10(b), on the one hand, and the § 10(b) aiding and abetting right of action, on the other, necessarily consist of different elements and extend to different classes of defendants. For example, the private right of action for a primary § 10(b) violation generally is understood to include the following elements: (1) use of an instrumentality of interstate commerce; (2) a material misrepresentation

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[2] *See Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673, 676 (N.D. Ind. 1966) (rejecting the argument that the 1934 Act "exclude[s] persons who do no more than aid and abet a violation of Section 10(b) and Rule 10b-5"); *see also Brennan* v. *Midwestern United Life Ins. Co.*, 286 F. Supp. 702 (N.D. Ind. 1968) (opinion on merits discussing bankruptcy and death of primary violator), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

or omission; (3) an intent to deceive, manipulate or defraud (scienter); (4) reliance by the plaintiff on the defendant's misrepresentation; (5) causation; and (6) damages flowing from the defendant's misconduct. *See, e.g., Weitzman* v. *Stein*, 436 F. Supp. 895, 902-04 (S.D.N.Y. 1977). Where the plaintiff's § 10(b) claim is predicated on an allegation that the defendant failed to disclose material information, the plaintiff must additionally prove that the defendant had assumed a duty to disclose. *See Chiarella* v. *United States*, 445 U.S. 222 (1980).

By contrast, the elements of the § 10(b) aiding and abetting right of action that have been fashioned by the lower courts are ordinarily stated in terms similar to those articulated by the Tenth Circuit in this case:

> To establish aider-and-abettor liability a plaintiff must prove (1) the existence of a primary violation by another; (2) knowledge of the primary violation by the alleged aider-and-abettor; and (3) substantial assistance by the alleged aider-and-abettor in achieving the primary violation.

First Interstate Bank of Denver, N.A. v. *Pring*, 969 F.2d 891, 898 (10th Cir. 1992) (citations and footnotes omitted), *cert. granted*, 61 U.S.L.W. 3818 (U.S. June 7, 1993) (No. 92-854).

Despite the "duty to disclose" element in a primary § 10(b) claim based on failure to disclose, some courts have held that aiding and abetting liability may be imposed absent such a duty where the alleged aider and abettor gave "assistance by action"—whatever that means—to the primary violator of § 10(b). *See id.* at 903. With respect to the "knowledge" requirement, courts have established unique but amorphous and unpredictable rules applicable only to the aiding and abetting right of action that variously require proof of "actual knowledge" in some circumstances and some form of "recklessness" in others, depending on a number of variables such as duties owed

to the plaintiff, the nature of the alleged assistance to the primary violator and, in some jurisdictions, a highly fact-specific "sliding scale" of culpability. *See generally* Feldman, *The Breakdown of Securities Fraud Aiding and Abetting Liability: Can a Uniform Standard Be Resurrected?*, 19 Sec. Reg. Rep. 45 (1990) (discussing various rules). Moreover, the "substantial assistance" element of the proposed § 10(b) implied private right for aiding and abetting has spawned yet another separate and complex doctrinal quagmire. *See, e.g.*, Bromberg & Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 Alb. L. Rev. 637, 701-39 (1988) (observing that "substantial assistance" element has "engendered a considerable amount of discussion and analysis in the cases" and discussing in detail this "rather difficult and complex area").

The doctrinal roots of the § 10(b) implied aiding and abetting right make it clear that that right is independent of the private right to sue the person who actually violates the statute. The criminal law—long viewed as a principal source of the § 10(b) aiding and abetting theory[3]—treats aiding and abetting as a separate and distinct offense.[4] In fact, in the criminal context, this Court has held that a defendant may be charged with and convicted of aiding and abetting a crime even after the "principal had been acquitted of the offense charged." *Standefer* v. *United States*, 447 U.S. 10, 20 (1980).

Thus, this is not a case where the Court is being asked simply to "flesh out"[5] the contours of a private remedy

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[3] *See, e.g.*, Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy,* In Pari Delicto, *Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 626 (1971).

[4] *See, e.g.*, 18 U.S.C. § 2 (one who "aids, abets, counsels or commands" is punishable as a principal); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-19 (1949) (distinguishing aiding and abetting from conspiracy and making clear that the former is a distinct offense).

[5] *Musick, Peeler*, 113 S. Ct. at 2089.

that has already been recognized under federal law. Unlike the contribution issue decided in *Musick, Peeler*, the question here is *not* how "damages are to be shared among persons or entities *already subject to . . . liability*." *Musick, Peeler*, 113 S. Ct. at 2088 (emphasis added). It is whether to create a *new* cause of action and thereby subject an entirely new class of defendants to liability for damages under the federal securities laws for "conduct not already subject to liability through private suit." *Id.*[6]

2. *The Language Of The Statute Demonstrates That Congress Did Not Intend To Establish A § 10(b) Aiding And Abetting Private Right of Action.*

The Court has repeatedly recognized that the "text of § 10(b) does not provide for private claims," and has therefore "made no pretense that it was Congress' design to provide the remedy afforded." *Lampf*, 111 S. Ct. at 2779-80; *Musick, Peeler*, 113 S. Ct. at 2088 ("The private right of action under Rule 10b-5 was implied by the judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given an unequivocal direction to the courts to do so."); *Ernst & Ernst*, 425 U.S. at 196 ("[T]here is no indication that Congress, or the [Securities and Exchange] Commission when adopting Rule 10b-5, contemplated such a remedy.").[7] While the Court in 1971

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[6] *See, e.g.*, Feldman, *supra* page 9, at 49-50 (observing that the "aiding and abetting theory has enormous significance because it radically expands the scope of Section 10(b) liability" to encompass a class of defendants not otherwise subject to suit).

[7] One of the principal drafters of SEC Rule 10b-5 recently reiterated, "Obviously neither I, nor the Commission that promulgated the Rule, had any . . . idea [that this Rule was the basis for a private suit] when the Rule was adopted." Freeman, *Foreword to Happy Birthday 10b-5: 50 Years of Antifraud Regulation*, 61 Fordham L. Rev. S1, S2 (1993).

acquiesced[8] in the private right of action for violations of § 10(b) that had been recognized as implicit by the lower courts under the Court's pre-1979 "expansive rights-creating approach," that approach has now been "abandoned." *Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1039 (1992) (Scalia, J., concurring in the judgment). Therefore, the "central inquiry" that applies to this case is whether "Congress intended to create, either expressly or by implication, a private cause of action"—here, for "aiding and abetting" the § 10(b) violation of another. *Touche Ross*, 442 U.S. at 575; *see also Musick, Peeler*, 113 S. Ct. at 2094 (Thomas, J., dissenting) ("When deciding whether a statute confers a private right of action, we ask whether Congress . . . intended to create such a remedy."). The answer to that question is clearly no.

Indeed, since the 73rd Congress "really never knew" that a private right of action against violators of § 10(b) even "existed," *Lampf*, 111 S. Ct. at 2780, *a fortiori* Congress did not intend to take the significant incremental step of authorizing private lawsuits for aiding and abetting § 10(b) violations. Section 10(b), on its face, "impose[s] direct liability on defendants for their own acts as opposed to derivative liability for the acts of others." *Musick, Peeler*, 113 S. Ct. at 2090. The statute expressly prohibits persons from using a "manipulative or deceptive" device in connection with a securities transaction. It does not extend liability to persons who "aid and abet" persons who engage in such conduct.[9]

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[8] *See Superintendent of Ins.* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971); *Touche Ross*, 442 U.S. at 577-79 n.19 ("in *Superintendent* this Court simply explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)").

[9] Section 10(b) provides only that "[i]t shall be unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive

3. Congress Consciously Declined To Impose Aiding And Abetting Liability Under The Securities Acts.

Even if this case were viewed as another instance of the Court being "asked to specify elements or aspects of the 10b-5 apparatus unique to a private liability arrangement," *Musick, Peeler*, 113 S. Ct. at 2090, rather than to a establish a whole new implied right of action, the result would be the same. Although it is an "awkward task," *Lampf*, 111 S. Ct. at 2780, the test for deciding the attributes of the § 10(b) implied private remedy is relatively straightforward. The Court "attempt[s] to infer how the [73rd] Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act." *Musick, Peeler*, 113 S. Ct. at 2089-90. In making that determination, the Court looks to the "contemporaneously enacted express remedial provisions" enacted by the 73rd Congress, *Lampf*, 111 S. Ct. at 2780, to "ensure that the rules established to govern the 10b-5 action are symmetrical and consistent with the overall structure of the [1934] Act, and, in particular, with those portions of the Act most analogous to the private 10b-5 right of action that is of judicial creation," *Musick, Peeler*, 113 S. Ct. at 2090.

device or contrivance . . . ." The statute thus neither makes it "unlawful" to "aid and abet" a violation nor vests private plaintiffs with a right to enforce the statute.

The only conceivable argument that § 10(b) allows for aiding and abetting prosecutions is the "directly or indirectly" language of the statute. But that phrase creates *primary* liability against a person who uses or employs an "indirect" *means* to perpetrate an intentional fraud; it does not create secondary liability for aiding and abetting. *See* Karnes, *Lenders' Liability for Aiding and Abetting Rule 10b-5 Violations: The Knowledge Standard*, 41 Sw. L.J. 925, 928 n.13 (1988) ("Although Rule 10b-5 provides for liability when the primary party perpetrates a violation indirectly, this is not secondary liability."); Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 Cal. L. Rev. 81, 94 n.83 (1981) ("there is no support for the proposition that Congress intended the 'directly or indirectly' language to encompass secondary liability"). In fact, the express provisions of the 1934 Act most closely analogous to § 10(b), §§ 9 and 18, *see Lampf*, 111 S. Ct. at 2781; *Musick, Peeler*, 113 S. Ct. at 2090-91, both employ similar language and it appears that no court has ever held that those provisions create aiding and abetting liability. *See* § 9 of the 1934 Act, 15 U.S.C. § 78i ("It shall be unlawful for any person, directly or indirectly," to manipulate security prices.); § 18 of the 1934 Act, 15 U.S.C. § 78r (rendering liable "[a]ny person who shall make or cause to be made" misleading statements in filings relating to securities sales).

While Congress was well aware of the aiding and abetting concept and had explicitly employed it in the criminal context twenty-five years prior to its enactment of the federal securities laws,[10] it chose not to incorporate aiding and abetting liability into the thoughtfully structured express private remedial scheme of the 1933 and 1934 Acts. None of the express remedies included in those statutes impose civil liability in private actions for aiding and abetting a violation of the securities laws.[11] It is difficult to "imagine [a] clearer indication"[12] that the 73rd Congress would likewise have rejected the imposition of aiding and abetting liability had it decided to create a private right to enforce § 10(b). And "[i]t would indeed be anomalous to impute to Congress an intention to expand the [defendant] class for a judicially *implied* cause of action beyond the bounds it delineated for *comparable express* causes of action." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975) (emphasis added).

The 73rd Congress also "knew of the collateral participation concept and employed it . . . throughout its unified

[10] Congress first enacted a general aiding and abetting criminal provision in 1909, *see* Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (formerly 18 U.S.C. § 550), and that provision, with minor modification, remains part of the federal criminal law today, *see* 18 U.S.C. § 2.

[11] *See* Kuehnle, *Secondary Liability Under The Federal Securities Laws*, 14 J. Corp. L. 314, 321 (1988) ("aiding and abetting liability generally is not provided expressly for under the federal securities laws").

[12] *Lampf*, 111 S. Ct. at 2780.

program of securities regulation." *Pinter* v. *Dahl*, 486 U.S. 622, 650 n.26 (1988). Congress was exceedingly specific in identifying the class of persons subject to liability. For example, it spelled out in detail the circumstances under which a broker-dealer may be held liable in a private suit for knowingly manipulating security prices, *see* § 9 of the 1934 Act, 15 U.S.C. § 78i, or "willfully participat[ing]" in a manipulation, *id.* § 78i(e). Section 11(a) of the 1933 Act, 15 U.S.C. § 77k(a), "explicitly enumerates the various categories of persons involved in the registration process who are subject to suit under that section, including many who are participants in the activities leading up to the sale." *Pinter*, 486 U.S. at 650 n.26. Both the 1933 and 1934 Acts also impose liability on persons who exercise "control" over other persons who violate the securities laws, subject to explicit defenses. *See* § 15 of the 1933 Act, 15 U.S.C. § 77o; § 20(a) of the 1934 Act, 15 U.S.C. § 78t(a). Congress therefore deliberated and agreed on who should be held liable for collateral participation, and judicial amendment of § 10(b) to add a right of action for aiding and abetting would allow plaintiffs to circumvent the restrictions placed on such liability, trumping these express congressional judgments.

It would be particularly inappropriate to create an aiding and abetting right of action under § 10(b) in light of the fact that the 73rd Congress enacted a comprehensive legislative regime consisting of "interrelated components," *Ernst & Ernst*, 425 U.S. at 206, without expressly including a provision proscribing aiding and abetting. As this Court has observed:

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.

Texas Indus., 451 U.S. at 645 (quoting *Northwest Airlines*, 451 U.S. at 97); *see also Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063, 2067 (1993) ("we [have] emphasized our unwillingness to infer causes of action in the ERISA context, since the statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly'") (emphasis in original) (citation omitted). Because of the potentially sweeping expansion of liability to new defendants posed by the aiding and abetting theory, "[i]mposing liability upon traditional participants in the securities markets by resort to this theory presents greater risks of frustrating the congressional scheme of securities regulation than direct enforcement of the rule." *Akin* v. *Q-L Invs., Inc.*, 959 F.2d 521, 525 (5th Cir. 1992).

Since enactment of the original securities acts, Congress has on several occasions amended those laws expressly to permit the SEC to pursue enforcement actions based on an aiding and abetting theory with respect to specific provisions. *See* Kuehnle, *supra* note 11, at 321 n.45; *see, e.g.*, 15 U.S.C. § 78u-2(a)(2) (§ 202 of the Securities Law Enforcement Remedies Act of 1990, authorizing the SEC to assess money penalties against persons who "willfully aided, abetted, counseled, commanded, induced, or procured" violations of certain securities laws); 15 U.S.C. § 80b-9(d) (§ 209(e) of the Investment Advisers Act, added in 1960, authorizing the SEC to prosecute any person who "aided, abetted, counseled, commanded, induced, or procured" a violation of that Act); 15 U.S.C. § 78o(b)(4)(E) (§ 15(b)(4)(E) of the 1934 Act, added in 1964, authorizing the SEC to prosecute any broker-dealer who "has willfully aided, abetted, counseled, induced, or procured the violation by any other person" of certain securities laws). But Congress has never amended the express private rights of action that it enacted in 1933 and 1934 to include aiding and abetting as a basis for a private damages action, and

in 1959 it rejected a proposal that would have created such liability.[13]

In short, "[w]hen Congress wished to create such liability, it had little trouble doing so," and its failure to create any private damages remedy against persons who "aid and abet" securities violations in the 1933 and 1934 Acts confirms that it "did not intend such persons to be defendants" in private actions asserted under § 10(b) or any other provision. *Pinter*, 486 U.S. at 650-51 & n.26 (rejecting imposition of liability under § 12 of the 1933 Act on secondary participants in transaction).

4. The Court Should Refuse To Recognize A New Private Right Of Action For Aiding And Abetting A § 10(b) Violation.

"Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Lampf*, 111 S. Ct. at 2783 (Scalia, J., concurring in part and concurring in the judgment). This Court should therefore decline to "raise up" an implied right of action for aiding and abetting violations of § 10(b). *See also Musick, Peeler*, 113 S. Ct. at 2088 (the Court "teach[es] that the creation of new rights ought to be left to the legislatures, not courts"); *Texas Indus.*, 451 U.S. at 646 (whether to add new private rights of action to a detailed and express remedial scheme "is a matter for Congress, not the courts, to resolve"); *Northwest Airlines*, 451 U.S. at 95 (same); *Akin*, 959 F.2d at 525 (the "formidable arguments" against § 10(b) aiding and abetting liability "have grown with the insistence that Congress legislate; that is, with increasing judicial reluctance to undertake legislative tasks").

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[13] *See Hearing Before a Subcommittee of the Senate Committee on Banking and Currency*, 86th Cong., 1st Sess. 275-76 (1959); *Hearings Before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 93, 103 (1959); *see also* S. Rep. No. 1757, 86th Cong., 2d Sess. 9 (1960).

As the Fifth Circuit recently observed, "open-ended readings of the duty stated by Rule 10b-5 threaten to rearrange the congressional scheme," and the "added layer of liability not for directly violating Rule 10b-5 but for aiding and abetting such violation is particularly problematic." *Akin*, 959 F.2d at 525. Other courts of appeals also have increasingly "questioned the propriety of implying . . . a cause of action [for aiding and abetting a violation of § 10(b) and Rule 10b-5]" given that it is a "'judge-made concept,'" and a product of "judicial creativity." *Renovitch* v. *Kaufman*, 905 F.2d 1040, 1045 n.7 (7th Cir. 1990) (citation omitted).[14] Even the district court that first held that such a right could properly be afforded to private litigants expressly acknowledged that Congress did not intend that result. *Brennan*, 259 F. Supp. at 680 ("there is nothing in the statute indicating a Congressional intent to impose civil liability on persons aiding and abetting violations of Section 10(b) and Rule 10b-5").

The only way to keep the sweeping "breadth" of the § 10(b) action from growing any farther "beyond the scope congressionally intended," *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2763 (1991), is to resist the temptation repeatedly to add new causes of action to the remedies already implied from § 10(b).[15] That is especially true in this case because engrafting an aiding and abetting private right of action to § 10(b) would nullify Congress' express policy judgments regarding who should be held liable for violating the federal securities laws. *See Ernst*

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[14] Commentators have made the same point. *See, e.g.*, Fischel, *supra* note 9, at 96-99 (aiding and abetting liability under § 10(b) contradicts Congress' intent).

[15] *See, e.g., Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 473 (1977) (rejecting argument that breach of fiduciary duty claim could be asserted under § 10(b) against majority stockholders and broker who allegedly "participated" in breach because "[t]he language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception").

& Ernst, 425 U.S. at 210; *Blue Chip Stamps*, 421 U.S. at 736 n.8.

B. Actual Knowledge Rather Than Recklessness Is The Appropriate Standard Upon Which To Predicate An Aiding and Abetting Violation.

If an implied private right of action exists against § 10(b) aiders and abettors, then this Court should hold that recklessness alone is insufficient as a predicate for liability. The language of § 10(b) indicates that actual knowledge,[16] rather than recklessness, is the appropriate standard for § 10(b) liability of *any* kind. Moreover, the actual knowledge requirement is consistent with the plain meaning of the phrase "aid and abet"—which inherently suggests willful, knowing conduct—as well as the criminal law standard that provides the doctrinal underpinnings for § 10(b) aiding and abetting liability. And the actual knowledge requirement avoids the inherent danger to innocent and remote parties posed by the confusing and ill-defined recklessness standard—a standard that is often virtually indistinguishable from the negligence standard that this Court in *Ernst & Ernst* rejected as a basis for § 10(b) liability.

Even if this Court were to determine that recklessness may be an appropriate standard for aiding and abetting under § 10(b) in some circumstances, only actual knowledge should provide a predicate for liability where, as in this case, the defendant had no affirmative duty to act or disclose and engaged in no actual misrepresentation. The Tenth Circuit's holding that recklessness alone may serve as a predicate for liability in this case threatens to expand the circle of individuals and entities susceptible to aiding and abetting claims well beyond that which could possibly

[16] Liability thus requires proof that the defendant either had actual knowledge of the alleged fraud or conscious intent to further known fraudulent conduct. *See, e.g., Ross* v. *Bolton*, 904 F.2d 819, 824 (2d Cir. 1990); *Schatz* v. *Rosenberg*, 943 F.2d 485, 496 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

have been intended by the Congress that enacted § 10(b), and even beyond the circle of defendants that this Court has recognized may be liable to private plaintiffs for primary § 10(b) violations. Such an increase in exposure to aiding and abetting liability would seriously undermine the legislative objective of maintaining stability and efficiency in the Nation's securities markets.

1. The Text Of § 10(b) Demonstrates That Actual Knowledge Is The Only Appropriate Standard Upon Which To Predicate Liability.

" 'The starting point in every case involving construction of a statute is the language itself.' " *Ernst & Ernst*, 425 U.S. at 197 (quoting *Blue Chip Stamps*, 421 U.S. at 756) (Powell, J., concurring)). The plain language of § 10(b) demonstrates that § 10(b) was intended to target only misconduct that is purposeful and willful. "Section 10(b) makes unlawful the use or employment of 'any manipulative or deceptive device or contrivance' in contravention of Commission rules." *Id.* (quoting § 10(b)). As this Court noted in *Ernst & Ernst*, "[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe *knowing* or *intentional* misconduct." *Id.* at 199 (emphasis added).[17] The ordinary meaning of this "operative language" of § 10(b) suggests only deliberate and knowing conduct, not actions that are normally characterized as reckless behavior. For example, the word "manipulative" "connotes *intentional* or *willful* conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Id.* at 199 (emphasis added). Similarly, the definitions of "device" and "contrivance" connote only purposive ac-

[17] Although the Court in *Ernst & Ernst* was concerned with whether negligence alone could be the basis for § 10(b) liability, *see* 425 U.S. at 193-94 n.12, the *Ernst & Ernst* analysis is equally pertinent here because the same statutory language is at issue.

tions,[18] and it is therefore extremely difficult to imagine a person "recklessly" "devising" or "contriving" to violate the law. *Cf. Santa Fe Indus.*, 430 U.S. at 478; *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 5-8 (1985).

The lower courts, however, have often seemed to ignore the text of § 10(b) in addressing whether recklessness is an appropriate standard for liability under § 10(b). Ironically, most courts have viewed this Court's reservation in *Ernst & Ernst* of the recklessness issue, *see* 425 U.S. at 193-94 n.12, as implicit approval of a recklessness standard. *See, e.g., Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44 (2d Cir.) ("[B]y leaving open the possibility that recklessness might satisfy the scienter requirement, the Supreme Court recognized that in certain instances a recklessness standard might be appropriate."), *cert. denied*, 439 U.S. 1039 (1978). But the express language of the statute refutes the view that recklessness can ever serve as a predicate for § 10(b) liability, let alone for "aiding and abetting" a § 10(b) violation, an entirely separate concept that itself intrinsically involves knowing and intentional misconduct.

2. *The Actual Knowledge Standard Is Most Consistent With The Concept Of And Doctrinal Basis For Aiding And Abetting Liability.*

That actual knowledge, rather than recklessness, is the only appropriate standard for liability for aiding and abetting a § 10(b) violation is confirmed by the fact that the doctrinal basis for implying aiding and abetting liability

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[18] *See Ernst & Ernst*, 425 U.S. at 199 n.20 (noting that "device" means " '[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice' ") (quoting *Webster's International Dictionary* (2d ed. 1934)); *id.* (defining "contrivance" as " '[a] thing contrived or used in contrivance; a scheme, plan, or artifice,' " and "contrive" as " '[t]o devise; to plan; to plot . . . [t]o fabricate . . . design; invent . . . to scheme . . . .' ") (quoting *Webster's*).

under § 10(b) is the criminal law,[19] which requires willful conduct to impose aider and abetting liability. The first case to recognize aiding and abetting as prohibited conduct under § 10(b) relied exclusively on the criminal law as its precedent for inferring a right of action against aiders and abettors. *See SEC* v. *Timetrust, Inc.*, 28 F. Supp. 34, 43 (N.D. Cal. 1939), *rev'd in part on other grounds*, 142 F.2d 744 (9th Cir. 1944). In subsequent SEC enforcement actions and private securities fraud cases, courts have continued to cite the criminal law as the doctrinal basis for aider and abetting liability under § 10(b).[20]

Under the criminal law, aiding and abetting liability requires that a defendant " 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he seek by his action to make it succeed.' " *Nye & Nissen*, 336 U.S. at 619 (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.)). This standard precludes a finding of liability based upon recklessness alone. Indeed, the plain and historically accepted meaning of the phrase "aid and abet" includes the notion that the defendant acted with a "purposive attitude" in assisting the known violation of the law by another. *Peoni*, 100 F.2d at 402.[21]

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[19] *See, e.g.*, Feldman, *supra* page 9, at 47 ("Most commentators agree that the aiding and abetting concept finds its antecedents in criminal law."); *see also supra* note 3.

[20] *See, e.g., SEC* v. *Seaboard Corp.*, 677 F.2d 1301, 1311 (9th Cir. 1982); *Landy* v. *FDIC*, 486 F.2d 139, 163-64 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

[21] Plaintiffs and the SEC have argued that recklessness is an appropriate standard because the common law of fraud in certain circumstances allows liability to be imposed pursuant to that standard. The common law, however, does not generally recognize "aiding and abetting" liability, but rather relies on "joint tortfeasor" and "concerted action" concepts developed by the courts principally to encompass a broad array of both intentional and negligence torts causing physical injury. *See* Ruder, *supra* note 3, at 620-21. Tort law therefore does

3. The Recklessness Standard Is An Unworkable Standard.

The appropriateness of the actual knowledge standard is further confirmed by the fact that in practice recklessness is a highly uncertain standard that tends to merge with and become indistinguishable from negligence—a § 10(b) standard squarely rejected in *Ernst & Ernst*. In a slightly different context, for example, then-Justice Rehnquist expressed concern that "[r]ecklessness too easily shades into negligence" in light of the fact that recklessness is a "vaguely defined, elastic standard." *Smith* v. *Wade*, 461 U.S. 30, 88, 89 n.16 (1983) (Rehnquist, J., dissenting). Indeed, " 'there is often no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence.'" *Id.* at 72 (quoting W. Prosser, *Law of Torts* § 34, at 185 (4th ed. 1971)).

In § 10(b) cases, courts have adopted definitions of recklessness that are virtually indistinguishable from the definition of negligence, *see, e.g., Keirnan* v. *Homeland, Inc.*, 611 F.2d 785, 788 (9th Cir. 1980) ("if they had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although they could have done so without extraordinary effort").[22] Several courts have noted the

not provide a direct analogy. Moreover, "the typical situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps*, 421 U.S. at 744-45; *accord Basic Inc.* v. *Levinson*, 485 U.S. 224, 243-44 (1988) ("The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases."). As a result, "[r]eferences to common-law practices can be misleading" when interpreting § 10(b). *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388 (1983).

[22] The SEC has previously observed that the *Keirnan* standard "seems close to negligence." Brief of the Securities and Exchange Commission,

fine and constantly shifting line that separates recklessness from negligence. *See, e.g., Hoffman* v. *Estabrook & Co.*, 587 F.2d 509, 516-17 (1st Cir. 1978) (noting the "grey area in which negligence merges into recklessness").[23]

The most-commonly invoked recklessness standard is the so-called "*Sundstrand* standard,"[24] which defines recklessness as "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." 553 F.2d at 1045. But the SEC has complained in the courts of appeals that the *Sundstrand* standard is hard to apply in practice[25] and imposes requirements at once too easy[26] and too difficult[27] for plaintiffs to satisfy. Thus, the SEC has advocated a standard of "conscious indifference to the truth," SEC *Hollinger* Br., *supra* note 22, at 14,

Amicus Curiae, Regarding Rehearing En Banc, at 19, 23-24, in *Hollinger* v. *Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (No. 87-3837), *cert. denied*, 111 S.Ct. 1621 (1991) [hereinafter "SEC *Hollinger* Br."].

[23] *See also Sanders* v. *John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977) (noting concern that "definition of 'reckless behavior' should not be a liberal one lest any discernible distinction between 'scienter' and 'negligence' be obliterated"); *Ackerman* v. *Schwartz*, 733 F. Supp. 1231, 1250 n.5 (N.D. Ind. 1989) (" 'gross negligence' tends to merge with 'recklessness' taking on the same meaning") (citing W. P. Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 34, at 214 (5th ed. 1984)), *appeal dismissed*, 922 F.2d 843 (7th Cir. 1991).

[24] *Sundstrand Corp.* v. *Sun Chem. Corp.*, 553 F.2d 1033 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

[25] SEC *Hollinger* Br., *supra* note 22, at 23 ("the *Sundstrand* standard is more complex, providing the trier of fact with less guidance in reaching an outcome in a particular case").

[26] *Id.* at 24 (some courts have interpreted *Sundstrand* standard in a way that raises "the same concerns as the *Keirnan* negligence-based standard").

[27] *Id.* at 23 (some courts have "conclude[d] that it imposes an 'extremely high threshold'" that "is disfavored").

as the appropriate definition of recklessness for § 10(b) aiding and abetting. However, this definition suffers from precisely the same deficiency as other recklessness standards—namely, that it is rooted in concepts of negligence rather than intent and defies rational implementation in a manner consistent with Congress' intention that only knowingly false or misleading statements and omissions be proscribed under § 10(b). The term "conscious indifference" has, in fact, repeatedly been equated to gross negligence.[28]

Definitions of "recklessness" and "reckless misrepresentation" are inherently "less than precise," resulting in "ad hoc, if not arbitrary, recklessness determinations." Johnson, *Liability For Reckless Misrepresentations and Omissions Under Section 10(b) of the Securities and Exchange Act of 1934*, 59 U. Cin. L. Rev. 667, 674 (1991); *see also* Note, *Recklessness and the Rule 10b-5 Scienter Standard After* Hochfelder, 48 Fordham L. Rev. 817, 828 (1980) (noting the "inability of most courts to define the recklessness standard").[29] As a result, what one judge may view as negligent conduct, and thus unremediable under § 10(b), another judge may label as "reckless" conduct that

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[28] *See, e.g., Ryan* v. *Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) ("Gross negligence in Oregon is characterized by conscious indifference to or reckless disregard of the rights of others."); *Doe* v. *New York City Dept. of Social Servs.*, 649 F.2d 134, 143 (2d Cir. 1981) (describing "close affinity" of gross negligence and deliberate indifference and noting the two have sometimes been "equated" though they are not "literally coextensive"), *cert. denied*, 464 U.S. 864 (1983); *Ahern* v. *Gaussoin*, 611 F. Supp. 1465, 1495 (D. Ore. 1985) ("Gross negligence is characterized by conscious indifference to or reckless disregard of the rights of others.").

[29] *See, e.g., Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1025 n.36 (6th Cir. 1979) ("We think it suffices to say that the [recklessness] standard falls somewhere between intent and negligence. There is little analytical value in deciding precisely where along this spectrum recklessness falls.").

meets the requirements of that provision. *See* Johnson, *supra* page 24, at 674.

Examples abound of situations in which nearly identical conduct has created liability in one case but not in another despite the fact that the same recklessness standard was used. For example, in *Vucinich* v. *Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984) (per curiam), the Ninth Circuit held that an investor was entitled to a trial on her claim that a broker recklessly gave her bad investment advice. However, in *McDonald* v. *Alan Bush Brokerage Co.*, 863 F.2d 809, 815 (11th Cir. 1989), the Eleventh Circuit held that a broker was entitled to judgment as a matter of law on a claim involving facts almost identical to those in *Vucinich*. Citing *Vucinich* for its standard of intent, the Eleventh Circuit concluded that while the advice may have been "unreasonable[ ]," *id.* at 815, it was not recklessly given.[30]

By contrast to the uncertain and malleable recklessness standard, the actual knowledge standard is precise and capable of uniform application. As one commentator has observed,

> One problem raised by the recklessness standard is that it does not provide as easy a test in application as would one requiring a showing of actual intent. The concept of recklessness belies the existence of a bright line test.

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[30] Even within the same circuit, the recklessness standard is inconsistently applied. In *Pegasus Fund, Inc.* v. *Laraneta*, 617 F.2d 1335 (9th Cir. 1980), the Ninth Circuit held that an accounting firm was entitled to judgment as a matter of law with respect to whether it recklessly failed to comply with professional standards even though it had a statutorily imposed duty. In that case, the Ninth Circuit concluded that, at most, "ordinary negligence" was involved. *Id.* at 1341. However, in *SEC* v. *Seaboard Corp.*, 677 F.2d at 1313, the Ninth Circuit held that an accounting firm had to proceed to trial on a similar question even though the firm had not violated any explicit statutory requirements.

2 T. Hazen, *The Law of Securities Regulation* § 13.4, at 83 (2d ed. 1990).

The inevitable result of applying the recklessness standard is that innocent and remote parties have greater exposure to the threat of § 10(b) litigation and its attendant costs. As this Court has noted, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps*, 421 U.S. at 740. The recklessness standard makes the § 10(b) claim even more attractive to strike-suit plaintiffs by substantially increasing the probability that such a claim will survive the defendant's summary judgment motion. *See, e.g., Rudolph* v. *Arthur Andersen & Co.*, 800 F.2d 1040, 1045-46 (11th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

The recklessness standard thus works directly to undermine the policy objectives of the Congress that enacted § 10(b), which were to devise a regulatory regime that would protect investors but not at the expense of stability and efficiency in securities markets. *See generally* S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933) (purpose of securities legislation is "to protect [both] the investing public and honest business"); 77 Cong. Rec. 937 (Mar. 29, 1933) (letter from President Roosevelt to Congress) ("The purpose of the legislation I suggest is to protect the public with the least possible interference to honest business."). The recklessness standard frustrates this legislative goal by creating highly uncertain and unwarranted § 10(b) liability exposure for secondary participants in securities transactions.

C. At A Minimum, A Recklessness Standard In The Absence Of A Fiduciary Duty Is Impermissible.

The problems of the recklessness standard are aggravated where the defendant engaged in no affirmative misrepresentation and owed no duty of disclosure to the

plaintiff. Some courts, including the court below, have held that the recklessness standard applies in such circumstances. The majority of the circuits, however, have rejected this approach, holding that recklessness is the appropriate standard in a nondisclosure case only when the defendant has an affirmative duty to disclose or to act.[31] Otherwise, all parties with *any* involvement whatsoever in a securities transaction—no matter how tangential—would have potential liability exposure under § 10(b) for reckless conduct.

Application of a recklessness standard in the absence of a duty to disclose would conflict with this Court's decisions in *Chiarella*, 445 U.S. 222, and *Dirks* v. *SEC*, 463 U.S. 646 (1983), both of which held that § 10(b) liability may not be predicated on a defendant's silence in the absence of a duty of disclosure. As the Seventh Circuit has explained,

> [w]hen the nature of the offense is a failure to "blow the whistle", the defendant must have a *duty* to blow the whistle. And this duty does not come from § 10(b) or Rule 10b-5; if it did the inquiry would be circular. The duty must come from a fiduciary relation outside securities law.

Barker v. *Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496 (7th Cir. 1986) (emphasis in original).

The recklessness standard imposed by the court below, in effect, creates from § 10(b) a federal duty of care and disclosure where none previously existed based solely on the fact of participation at any point in the normal chain

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[31] *See, e.g., Schatz* v. *Rosenberg*, 943 F.2d 485, 496 (4th Cir. 1991); *Schneberger* v. *Wheeler*, 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989); *Moore* v. *Fenex, Inc.*, 809 F.2d 297, 303-04 (6th Cir.), *cert. denied*, 483 U.S. 1006 (1987); *Metge* v. *Baehler*, 762 F.2d 621, 625 & n.1 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Cleary* v. *Perfectune, Inc.*, 700 F.2d 774 (1st Cir. 1983); *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d Cir.), *cert. denied*, 439 U.S. 930 (1978).

of events that constitutes a routine securities transaction. Such expansion of secondary liability would upset the line drawn in *Chiarella* between those parties subject to § 10(b) liability and those that are not, and impose the kind of "duty by status" on securities professionals that the Court seemed to reject in *Dirks*.

Indeed, the Seventh Circuit has held that § 10(b) aiding and abetting liability can never be imposed where, as here, the defendant had no fiduciary duty and engaged in no affirmative misrepresentation. *See Barker*, 797 F.2d at 495-96; *LHLC Corp.* v. *Cluett, Peabody & Co.*, 842 F.2d 928, 932 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988). Unless that is the rule, it would be easier in some cases for a plaintiff to recover against a secondary participant with only a remote link to a securities transaction than against a principal participant in the transaction. Surely, Congress did not intend that result.

Thus, the recklessness standard applied by the court below would add yet another layer to a body of judicially created law that has expanded well beyond the intent of the Congress that enacted § 10(b). There is no basis even to recognize an implied private right of action for aiding and abetting a violation of § 10(b), much less to fashion a recklessness liability standard for such a right of action.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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